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In the Supreme Court of the United States

OCTOBER TERM, 1985

ALBERT J. LOVSHIN, PETITIONER

v.

DEPARTMENT OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE MERIT SYSTEMS PROTECTION BOARD SUPPORTING PETITIONER

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QUESTION PRESENTED

In the centerpiece of the Civil Service Reform Act of 1978, 5 U.S.C. Chapter 43, Congress provided a new mechanism for the removal or demotion of federal employees for unacceptable performance which was inextricably linked with new performance appraisal systems required by the Act. Congress intended these new provisions to benefit agencies, employees, and the public by providing a more effective and equitable means of managing the federal work force. The question presented is whether an agency may deny employees the substantive and procedural rights mandated by Chapter 43 when it removes or demotes those employees for unacceptable performance.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Merit Systems Protection Board was an intervenor below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1-62) is reported at 767 F.2d 826. The decision of the Merit Systems Protection Board in this appeal (Pet. App. B at 1-12) is unreported. The decision of the Board in *Gende* v. *Department of Justice*, is reported at 23 M.S.P.R. 604 (App., *infra*, 1a-22a). The rule announced by the Board in *Gende* was overruled by the court in this case.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1985, and the mandate was issued on August 2, 1985 (Pet. App. C at 1-2). The petition for writ of cer-

tiorari was filed on November 18, 1985. The Board received its copy of the petition on November 22, 1985, and submits this brief in support of the petition pursuant to Rule 19.6 of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of 5 U.S.C. (& Supp. II) 2301-2305, 4301-4315, 7501-7543 and 7701-7703 are reproduced at Pet. Apps. D, E, F and G.

STATEMENT

The petitioner Albert Lovshin was removed, effective November 30, 1981, from his Electrical Engineer position with the Department of the Navy for alleged unsatisfactory performance. On appeal to the Merit Systems Protection Board (the Board),[1] a question arose as to whether the removal was governed by the new provisions for actions based on unacceptable performance which Congress enacted in the Civil Service Reform Act of 1978 (Reform Act), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* The Board's presiding official found that the Reform Act's new provisions at 5 U.S.C. 4302-4303 (Pet. App. D at 2-5) were not applicable and he sustained the removal action under other provisions of the civil service law found at 5 U.S.C. (& Supp. II) 7501 *et seq.* (Chapter 75) (Pet. App. E at 1-2). Pet. App. B at 3-4. The presiding official's decision was issued before the Board's decision in *Gende* v. *Dep't of Justice*, 23 M.S.P.R. 604 (1984) (App., *infra*, 1a-22a), which held that 5 U.S.C. (& Supp. II) 4301 *et seq.* (Chapter 43) was the exclusive proce-

[1] The Board is an independent, adjudicatory agency which hears and decides appeals from personnel actions taken against federal employees (5 U.S.C. 1205(a), 7701(a)). Appeals are heard first by a Board presiding official or administrative law judge (5 U.S.C. 7701(b); Pet. App. G at 1), who issues an initial decision. A party may petition the full Board for review of the initial decision or may instead seek judicial review (5 U.S.C. 7701(e), 7703(a)(1)).

dure for performance-based actions effected after October 1, 1981, and that Chapter 75 was no longer available for such actions (App., *infra*, 14a). The Office of Personnel Management, which is the only agency authorized under 5 U.S.C. 7703(d) to seek judicial review of the Board's decisions, did not seek review of *Gende*.

The petitioner sought review directly in the United States Court of Appeals for the Federal Circuit. The Board intervened and requested the court to remand the appeal to allow the Board to consider whether the action was properly taken under Chapter 75 in light of the Board's intervening decision in *Gende* (Pet. App. A at 3-4). Although the case was originally argued before a three-judge panel, the court issued an en banc decision from which all members of the original panel, and two others, dissented. The court overruled the Board's decision in *Gende*, and held that the agency had the option to proceed under Chapter 75 in lieu of Chapter 43 to effect petitioner's removal (Pet. App. A at 4). The court sustained the removal action under Chapter 75 (Pet. App. A at 4-5). The court found, however, that the record was not adequate to rule on the petitioner's claim that he was entitled to remain on the agency's rolls until the Office of Personnel Management made an initial decision on the disability retirement application which the agency had filed on his behalf. The court therefore remanded the case to the Board for a determination of whether the petitioner had any entitlement to back pay (*id.* at 43-44).

The Board adopts the particulars contained in petitioner's statement with two exceptions. This case is the first time the Board has supported a petition for writ of certiorari, although it is not the first time the Board has intervened in a court of appeals proceeding. Additionally, the Board takes no position on whether the agency violated the regulation at 5 C.F.R. 831.1206 (1983) (Pet. App. H at 1) governing disability retirement applications. We believe this issue should be addressed by the Board on remand following this Court's review of the central question presented here.

REASONS FOR GRANTING THE PETITION

1. The decision below is the most important judicial decision to date interpreting the Civil Service Reform Act of 1978. This case presents issues of substantial public importance because the decision guts Congress' new statutory scheme for removing and demoting federal employees based on unacceptable performance. The decision deprives federal agencies, employees, and the public of the substantial benefits Congress intended to confer when it comprehensively reformed the civil service laws in 1978. This is the first time since its establishment in 1978 that the Board has filed a brief supporting a petition seeking the Court's review of a matter involving the civil service laws.

Described as "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883," the Reform Act's central task was to "[a]llow civil servants to be * * * hired and fired more easily, but for the right reasons." S. Rep. 95-969, 95th Cong., 2d Sess. 1, 4 (1978), *reprinted in* 2 House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *No. 96-2, Legislative History of the Civil Service Reform Act of 1978*, at 1465, 1468 (Comm. Print 1979) [hereinafter cited as *Leg. Hist.*]. Congress found that the existing performance appraisal systems were glaringly ineffective and that it was almost impossible to take personnel actions against employees for unacceptable performance. S. Rep. 95-969, *supra*, at 2, 9. To correct these defects Congress amended Chapter 43 to establish a single, integrated framework which linked the results of new agency performance appraised systems to a variety of performance-based actions, including removal and demotion actions. 5 U.S.C. 4302(a)(3) and (b)(6) (Pet. App. D at 2-3). Congress also established new procedures in Section 4303 for actions based on unacceptable performance. *Id.* at 3. Chapter 43 was viewed as the centerpiece of the Reform Act, and it was intended to benefit agencies, employees and the public by providing a more effective and

equitable means of managing the federal work force. S. Rep. 95-969, *supra*, at 4, 9-10.

In *Gende* the Board found persuasive indications in the Reform Act and its legislative history that Congress intended agencies to rely on Chapter 43, not on Chapter 75, to effect performance-based removal and demotion actions after October 1, 1981—the date Chapter 43 was fully operational (App., *infra*, 7a). In the decision below, the court of appeals overruled *Gende* and held that Chapter 75 [2] was still available for performance-based adverse actions effected after October 1, 1981 (Pet. App. A at 38). The court further held that agencies could rely, in the alternative, on both Chapters 43 and 75 to effect actions based on unacceptable performance, and that none of the substantive or procedural requirements of one chapter applied to the other chapter. *Id.* at 16, 37, 40.

The decision below clearly contravenes the Reform Act by authorizing agencies to continue to rely on Chapter 75 for performance-based removal and demotion actions and to completely ignore the statutory framework in Chapter 43 which Congress expressly created for such actions. Under the majority's analysis, a Chapter 75 action for unacceptable performance need not be based on the performance standards and critical elements which Congress required in 5 U.S.C. 4302(b)(2) be communicated to each employee. Thus, in one ill-considered stroke the majority has disassembled Chapter 43 by severing the link which Congress expressly established between performance-based actions and the new performance appraisal systems required under the Reform Act. Additionally, the decision deprives approximately 1.8 million federal employees covered by Chapter 43 of two substan-

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[2] Chapter 75 provides for suspension, removal, and demotion actions "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a) (Pet. App. E at 1). Prior to the Reform Act, agencies took actions based on unacceptable performance under Chapter 75.

tive statutory rights for which Congress provided in Chapter 43 and which are not present in Chapter 75: the right to reasonable performance standards and to an opportunity to demonstrate acceptable performance before the agency proposes a removal or demotion action based on unacceptable performance. 5 U.S.C. 4302(b)(1) and (6) (Pet. App. D at 2-3).

Finally, the court's decision has far-reaching and disturbing implications for both the civil service system and the public it was intended to serve. There is now little incentive for agencies to draft performance standards for their employees which comply with the statutory requirements in Section 4302(b)(1) since those standards are irrelevant in Chapter 75 performance actions. Because an agency never need rely on Chapter 43 for removal and demotion actions, the court's decision makes it a nullity with respect to those actions. As a result, agencies, employees, and the public alike are deprived of the substantial benefits Congress expected to confer in Chapter 43 by establishing new performance appraisal systems which provided a more effective and equitable means of managing the federal work force. It is difficult to believe that Congress would have constructed such a careful framework merely to have it ignored. The court's decision not only contravenes the Reform Act but is retrogressive as well, taking civil service reform a giant step backward. The majority decision returns performance-based actions to their pre-Reform Act status when there was no necessary or effective link between these actions and agency performance appraisal systems.

2. The Federal Circuit's decision reflects substantial differences among its judges. Five judges agreed with the Board's decision in *Gende* and found that both the Reform Act and its legislative history supported the conclusion that Congress intended Chapter 43 to be the exclusive procedure for performance-based removals and demotions once that chapter was fully implemented. Pet. App. A at 45, 59. Further, the dissenting judges clearly did not

view this question as a close one, and they sharply criticized the majority opinion as "astonishing" and "erroneous as a matter of law" (*id.* at 51 (Skelton, J., dissenting, joined by Kashiwa, Bennett, Miller & Newman, JJ.)); see also *id.* at 60 (Newman, J., dissenting, joined by Kashiwa, Bennett & Miller, JJ.).

3. Review by this Court is warranted because the decision below clearly conflicts with the applicable decisions of this Court in three significant respects. First, the decision departs from the well-established principle that an administrative agency's construction of the statutes it is charged with administering is due substantial deference. *E.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 27-28; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Although the court below allowed the Board to intervene in this case and to defend its decision in *Gende*, the court ultimately refused to accord any deference to the *Gende* decision. Second, the decision contravenes the well-established principle that a court has no authority to sit as a committee of review and to reorder the priorities Congress selected in enacting a statute. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 194-195 (1978). Based on its erroneous criticisms of the statutory scheme, the decision below eviscerates the exclusive procedures Congress enacted for performance actions and has resurrected in their place the pre-1978 procedures which Congress soundly rejected. Third, the decision violates the fundamental rules of statutory construction enunciated by this Court. Although this Court has stated that the judicial task is to "look to the provisions of the whole law, and to its object and policy" (*Richards* v. *United States*, 369 U.S. 1, 11 (1962)), the decision below ignores the central purpose of the Reform Act. Similarly, this Court has warned that statutory construction confining itself to the bare words of the statute is dangerous because "literalness may strangle meaning." *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962), quoting *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44

(1946). Yet, the Federal Circuit's decision was based on just such a literal approach.

4. Under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 39 *et seq.*, the Federal Circuit was vested with exclusive jurisdiction of all appeals from the Board arising under 5 U.S.C. 7703(b)(1) and (d). Thus, because of the special status of the Federal Circuit, the decision below already has nationwide impact and review by this Court is particularly appropriate to address the important question of federal law presented in this case.

ARGUMENT

I. THE COURT OF APPEALS FLOUTED THE LAW WHEN IT SUBSTITUTED ITS JUDGMENT FOR THE BOARD'S AND WHEN IT REFUSED TO ACCORD THE BOARD'S DECISION THE DEFERENCE DUE AN AGENCY'S INTERPRETATION OF THE STATUTE IT IS CHARGED TO CONSTRUE

The court of appeals flouted the law of this Court when it concluded that "the usual deference which a court must give the interpretation of a statute by the agency charged with its administration is not appropriate in this instance because the MSPB itself has not taken a consistent position" (Pet. App. A at 4). Despite its characterization of the *Gende* decision as "thorough and perceptive" (Pet. App. A at 30), the court cited three reasons to excuse its refusal to accord *Gende* normal judicial deference. First, ths court found that *Gende* modified the Board's earlier decision in *Wells* v. *Harris*, 1 M.S.P.B. 199 (1979). Second, the court stated that *Turnage* v. *United States*, 230 Ct. Cl. 799 (1982), and *Kochanny* v. *Bureau of Alcohol, Tobacco & Firearms*, 694 F.2d 698 (Fed. Cir. 1982) constituted precedent as to the issue addressed in *Gende*, and that *Gende* departed from the analysis in those cases (Pet. App. A at 4). Finally, the court opined that the Board itself had acknowledged that *Wells* has generated inconsistent Board decisions. *Id.* at 30. The Court then

proceeded to essentially ignore the Board's analysis in *Gende*.[3] All the reasons advanced by the court in support of its refusal to accord ordinary deference to *Gende* are either flawed or irrelevant to the question.

The question of deference does not even arise when an issue can be resolved either by the express language of the statute being construed or by necessary implication. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31, 36 (1981). For the reasons set forth (pages 13-22, *infra*), the Board's holding in *Gende* flows directly from the "necessary implications" of the Reform Act, and the question of administrative deference need not be addressed. However, even if the *Gende* holding is not viewed as ineluctable, and this was the court of appeals' view (Pet. App. A at 31), the question then becomes whether the court "should defer to [the Board's] judgment as a permissible construction of the [Reform] Act or instead disregard the agency's view and proceed to construe the statute based on its own view of what would best serve the purpose and policy of the Act." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. at 36. Because the court's reasons for its failure to accord ordinary deference do not withstand scrutiny, and because the court failed to consider factors that this Court has stated compel deference, the court's views must be rejected.

The court incorrectly found that the *Gende* decision modified *Wells*. By its terms, the issue in *Wells* concerned removals and demotions for unacceptable performance taken prior to October 1, 1981—the date by which federal

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[3] Although the court made a bow in the direction of the Board's analysis in *Gende*, what it had to say about that analysis is not comprehensible. The court stated that the objective of the Board in *Gende* was "to interpret the [Reform Act] in a manner which would give effect to merit principles [found in 5 U.S.C. 2301(b)], an objective clearly intended by Congress" (Pet. App. A at 31). The Board nowhere mentioned merit principles in *Gende*. Instead, the Board looked to the language of Chapter 43 and analyzed the legislative history of that chapter.

agencies were required by the Reform Act to have performance appraisal systems in place. See 5 U.S.C. 4302 (b) (2). As the Board stated in *Wells*, "the central issue presented here is whether, and if so under what limitations, removal or demotion actions based on 'unacceptable performance' may be taken under § 4303 against employees for whom a performance appraisal system has not yet been established under § 4302." *Wells*, 1 M.S.P.B. at 200. The Board then held that Chapter 75 was available for performance-based actions, but that holding was clearly limited to actions taken before October 1, 1981 (*id.* at 235-36). The issue in *Gende* was how those actions were to be effectuated after October 1, 1981 (App., *infra*, 1a, 4a). Thus, it is abundantly clear that *Wells* and *Gende* deal with two distinctly different issues, and *Gende* cannot be viewed as modifying *Wells*[4] in a manner that permits the court of appeals to deny *Gende* deference.

Similarly, the court of appeal's statement that *Wells* generated Board decisions which the Board acknowledged are inconsistent does not support the court's refusal to accord deference to *Gende*. The Board did, in *Gende*, acknowledge inconsistencies (App., *infra*, 6a n.5), but those inconsistencies related to actions taken prior to October 1, 1981, and thus have no impact at all upon the issue now before this Court. Furthermore, even assuming, *arguendo*, that the Board changed its perception of the Reform Act between *Wells* and *Gende*, as the court of appeals would have it (Pet. App. A at 30), this Court has made it clear that such a change is not sufficient to cause a court to fail to accord deference to an agency's interpretation of a statute. *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 25.

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[4] The Board stated in *Gende* that "to the extent" *Wells* "allows" for the interpretation that agencies may effect performance-based Chapter 75 actions after October 1, 1981, it must be modified (App., *infra*, 6a-7a). In so stating, the Board simply recognized that *Wells* could be misread.

In *Chevron U.S.A. Inc.* the Environmental Protection Agency (EPA) had changed its definition of the term "source" for purposes of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 *et seq.*, and the United States Court of Appeals for the District of Columbia concluded that because of the change in definition no deference was due to EPA's interpretation. *Chevron U.S.A. Inc.*, slip op. 3. This Court flatly rejected the court of appeals' conclusion as to deference. The Court made it clear that an agency may change its interpretation of a statute when Congress has not directly addressed the precise question at issue, and that in such instances deference is due the agency's interpretation. *Chevron U.S.A. Inc.*, slip op. 25; *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 485 (1979) (This Court is reluctant "to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience."). Similarly, the Board's interpretation in *Gende* must be accorded deference, even in the presence of inconsistencies. As the court of appeals admitted, *Gende* is both "thorough and perceptive" (Pet. App. A at 30). Deference is also particularly appropriate because of the Board's status as an independent adjudicatory agency, and because in *Gende* the Board's interpretation necessitated a "full understanding of the force of the statutory policy in the given situation" that "depended upon more than ordinary knowledge" respecting the matter in issue. *Chevron U.S.A. Inc.*, slip op. 6.[5]

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[5] Although consistency concededly is a factor to be considered by a court in deciding whether to accord deference to an agency interpretation (*SEC* v. *Sloan*, 436 U.S. 103, 117-18 (1978), quoting *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978)), any differences between *Gende* and *Wells* do not constitute "a path of * * * tortured vacillation and indecision" such that deference should not be accorded. *Secretary of the Interior* v. *California*, 464 U.S. 312, 320 n.6 (1984).

Finally, the court of appeals incorrectly found the *Turnage* and *Kochanny* decisions to be precedential decisions to which that court was bound to defer (Pet. App. A at 23-24). In both those decisions the issue before the courts was how agencies were to effect performance-based removals prior to October 1, 1981, and the *Wells* rule was approved without reaching the *Gende* issue. In *Turnage*, the Court of Claims began with broad language, stating that the Reform Act "established two different, mutually exclusive procedural routes for disciplining employees on the basis of unsatisfactory job performance" (*Turnage*, 230 Ct. Cl. at 800). This statement would, at first blush, seem to apply to actions occurring after October 1, 1981. Later in its decision, however, the court characterized *Wells* as applying to the "*interim period* between the effective date of the Act and an agency's adoption of an appraisal system" and then implicitly adopted *Wells*. *Id.* at 802 (emphasis added). Thus, the court's statement that there are two mutually exclusive procedural routes cannot be read as an absolute principle applicable to post-October 1, 1981 actions.

Similarly, in *Kochanny*, the issue before the court was the propriety of *Wells*, not what was to be the rule after October 1, 1981. Indeed, in approving *Wells*, the *Kovhanny* court quoted and adopted language from *Drew* v. *United States Dep't of Navy*, 672 F.2d 197 (D.C. Cir. 1982), cert. denied, 459 U.S. 1072 (1983), which limits *Wells* to pre-October 1, 1981 actions (*Kochanny*, 694 F.2d at 701 (emphasis added)):

> In amending Chapter 43 in 1978 by establishing the aforementioned performance appraisal systems, Congress stipulated that such systems need not be fully implemented until October 1, 1981. Until such systems were established, *Wells* held that federal employees could not properly be dismissed under Chapter 43 and that *in the interim*, Chapter 75 dismissals could proceed on performance-based grounds.

Thus, it is clear that no precedent of the court of appeals bars the *Gende* rule, and that rule should stand.

Failure to accord deference is particularly egregious here where the Board is engaged in the "contemporaneous construction" of a new statute, the machinery of which it is charged with " 'setting * * * in motion, * * * making the parts work efficiently and smoothly while they are yet untried and new' " (*Power Reactor Devel. Co.* v. *International U., Etc.*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315 (1933)).

II. THE COURT GUTTED THE REFORM ACT AND IGNORED ITS LEGISLATIVE HISTORY IN HOLDING THAT CHAPTER 43 WAS NOT THE EXCLUSIVE PROCEDURE FOR PERFORMANCE-BASED ACTIONS AND THAT CHAPTER 75 WAS STILL AVAILABLE FOR SUCH ACTIONS

The question of whether Chapter 43 is the exclusive procedure for performance-based actions turns on the provisions of the Reform Act and its legislative history. In Section 4303, which is entitled "[a]ctions based on unacceptable performance," Congress provided in subsection (a) that: "[s]*ubject to the provisions of this section*, an agency may reduce in grade or remove an employee for *unacceptable performance*" (Pet. App. D at 3 (emphasis added)). In the legislative history, Congress stated that "[a]ctions based on unacceptable performance are governed by Chapter 43 * * *" (S. Rep. 95-969, *supra*, at 46). Despite this clear statutory language and legislative history, the majority held that "Chapter 75 remains available for performance-based adverse actions * * *" (Pet. App. A at 38). This makes no sense.

A brief review of the pertinent provisions of the Reform Act and its legislative history illustrates the majority's error. Prior to the Reform Act, there was no separate mechanism which governed actions based on unacceptable performance. Chapter 75 provided the only framework for actions based on either misconduct or on unacceptable performance. Congress found that the pre-

1978 Chapter 43 performance evaluation system was glaringly ineffective because it did not "distinguish employees whose performance is below an acceptable level to make the charges stick." S. Rep. 95-969, *supra*, at 9; see also *id.* at 39-40. Congress also found that the existing Chapter 75 procedures made it almost impossible to take action against employees "on the grounds of unacceptable performance" (*id.* at 40).

To achieve the central purpose of the Reform Act—to "[a]llow civil servants to be . . . hired and fired more easily, but for the right reasons" (S. Rep. 95-969, *supra*, at 4)—Congress acted to remedy these defects. Congress amended Chapter 43 to require agencies to establish new performance appraisal systems in Section 4302 that would provide a comprehensive framework for a wide variety of performance-based actions, including removal and demotion actions. Agencies were required by Section 4302(b)(2) to develop performance standards and critical elements for each position and to communicate these to each employee no later than October 1, 1981 (Pet. App. D at 2-3). Congress provided that an employee could be removed or demoted for unacceptable performance, which was defined in Section 4301(3) as performance "which fails to meet established performance standards in one or more critical elements of such employee's position" (*id.* at 2). To streamline and expedite the new procedures, Congress exempted performance actions from the "efficiency of the service" requirement which it retained for Chapter 75 actions. S. Rep. 95-969, *supra*, at 43. Congress also provided in Section 7701(c)(1) that actions taken under Section 4303 be reviewed by the Board under the "substantial evidence" standard, a less intrusive review than that authorized by the "preponderance of the evidence" standard (Pet. App. G at 1). Finally, Congress amended Chapter 75 to exclude Section 4303 actions from coverage of that Chapter. See 5 U.S.C. 7512(D) (Pet. App. E at 1); S. Rep. 95-969, *supra*, at 46.

In concluding that the Board "read into Chapter 75 a limitation which Congress expressed nowhere in the statute itself or in the legislative history" (Pet. App. A at 31), the majority opinion totally disregarded persuasive indications that Congress intended to prohibit use of Chapter 75 for actions based on unacceptable performance once Chapter 43 was operational, *i.e.*, on October 1, 1981. Besides the language of Section 4303(a) and the legislative history cited above, there are other Congressional statements bearing on this issue that the court ignored. In summarizing the Senate bill, Senator Percy, a cosponsor of the bill, stated that (2 *Leg. Hist.* 1614):

> Two adverse action procedures are established by S. 2640, one for actions based on unacceptable performance (incompetence), the other for actions based on other cause (such as misconduct).

Hence, Congress spoke in the plainest terms of its intention to establish two different and mutually exclusive procedures for unacceptable performance vis-a-vis misconduct. Despite this, the court used terms of art unique to Chapter 43 actions—"unacceptable performance" and "critical elements"—to describe actions it found could be brought under Chapter 75. The court held that an agency could bring an action "relying on Chapter 43 for '*unacceptable performance*' in a critical element with an *alternative, or additional* charge, under Chapter 75 * * *" (Pet. App. A at 37 (emphasis added)). It is clear that the court's holding that the same action can be brought under both Chapters 43 and 75 applies not only to "mixed" cases based on both performance and misconduct charges but also applies to actions based exclusively on unacceptable performance. See *Wilson* v. *Dep't of Health & Human Services*, 770 F.2d 1048, 1054 (Fed. Cir. 1985).

The dissenting judges in *Lovshin* correctly found that the majority's holding that Chapter 75 may still be used for actions based on "unacceptable performance" violated both Chapters 43 and 75 (Pet. App. A at 51). As noted

above, this holding is directly contrary to the unambiguous language in Section 4303(a) which provides that Chapter 43 governs removal and demotion actions for "unacceptable performance" (Pet. App. D at 3). The court's holding also contravenes Section 7512(D), which provides that Chapter 75, Subchapter II, is expressly inapplicable to "a reduction in grade or removal under section 4303 of this title * * *" (Pet. App. E at 1). See also S. Rep. 95-969, *supra*, at 46 ("[a]ctions based on unacceptable performance are governed by Chapter 43 * * *)". Finally, the majority's holding violates the Office of Personnel Management (OPM) regulation at 5 C.F.R. 432.205(b) (1983) (Pet. App. B at 4 n.1) by authorizing agencies to take performance-based Chapter 75 actions even after they have implemented performance appraisal systems which OPM has reviewed and approved. This OPM regulation allows Chapter 75 performance actions "[p]rior to the [agency's] completion of an approved [performance appraisal] system plan and the development of critical elements and standards * * *." There is no indication in the regulation that such actions are allowed thereafter. The court's failure to even mention this regulation is baffling in view of the fact that it was cited in *Gende* (App., *infra*, 6a) and was also quoted in full by the Board's presiding official in this case (Pet. App. B at 4). Like the Board, OPM is an administrative agency which Congress has vested with substantial authority for enforcing the Reform Act, and the court's failure to defer to OPM's interpretation was clearly error. *Chevron U.S.A. Inc.*, slip op. 6.

Despite the fact that the above statutory provisions and legislative history proscribe the use of Chapter 75 for actions based on "unacceptable performance," the court found nothing which, in its view, qualified as "a clear statutory provision or at least a single specific statement by Congress to the effect that Chapter 75, henceforth, could not be used for performance-based adverse actions" (Pet. App. A at 31). The majority's

retreat into this perplexing kind of literalism is exactly the kind of statutory misconstruction which this Court has disapproved because it "strangle[s]" the statutory meaning (*Utah Junk Co.*, 328 U.S. at 44). The majority opinion ignores the expressed purposes which Congress sought to achieve in amending Chapter 43. It is clear that the new Chapter 43 procedures which Congress created were primarily intended as a relief measure to remedy the defects in the existing Chapter 75 procedures. Undoubtedly, the astonishing notion that agencies would wish to return to the very same Chapter 75 procedures which they themselves had criticized as glaringly defective never occurred to Congress. Hence, it is understandable that the legislative history does not contain the "specific statement" (Pet. App. A at 31) which the majority opinion erroneously insists upon as the only valid indication of congressional intent. Particularly where Congress has drafted a comprehensive scheme of reform, one can hardly expect Congress to address how the mechanics of the statute will function in every situation (see *Lindahl* v. *Office of Personnel Management*, No. 83-5954 (Mar. 20, 1985), slip op. 23); let alone insist, as the majority opinion does, that Congress explicitly address itself to results that contradict the legislative purpose. Inexplicably, the court failed to undertake the appropriate judicial task of "look[ing] to the provisions of the whole law, and to its object and policy." *Richards*, 369 U.S. at 11, quoted in *Lindahl*, slip op. 23-24.

III. THE COURT'S DECISION DEPRIVES EMPLOYEES OF SUBSTANTIVE RIGHTS FOR WHICH CONGRESS EXPRESSLY PROVIDED, CREATES A PROCEDURAL LABYRINTH AND WILL RESULT IN INORDINATE DELAYS IN THE ADJUDICATION OF APPEALS

Before his removal, the petitioner was one of approximately 1.8 million employees in the competitive civil service who are covered by Chapter 43. See 5 U.S.C. 7301(1) and (2) (Pet. App. D at 1-2). The majority

opinion deprives these employees of two important substantive rights for which Congress expressly provided in Chapter 43: the right to have their work performance evaluated according to reasonable performance standards and the right to an opportunity to demonstrate acceptable performance before they are subject to a removal or demotion action based on unacceptable performance. See 5 U.S.C. 4302(b)(1) and (6) (Pet. App. D at 2-3); see also 5 C.F.R. 432.203(b) (1983). Although the majority opinion recognized that employees subject to Chapter 43 actions were entitled to these protections, the court ultimately characterized these rights as "procedural prerequisites" that were inapplicable to the petitioner's case because his agency had elected to process his removal action under Chapter 75 rather than under Chapter 43 (Pet. App. A at 40). In essence, the court held that by simply labeling its performance-based action as a Chapter 75 action, an agency could thereby deprive an employee of both the substantive and procedural protections for which Congress provided in Chapter 43. Not surprisingly, the five judges who dissented from the majority opinion characterized the court's analysis in support of this result as "erroneous as a matter of law" (*id.* at 51).

Prior to the enactment of the Reform Act, there was no statutory requirement that employees be evaluated according to performance standards that were based on objective criteria and tailored to the specific duties of their positions. Compare 5 U.S.C. (1976 ed.) 4302 *et seq.* and 5 U.S.C. 4302(b)(1) (Pet. App. D at 2); see also S. Rep. 95-969, *supra*, at 39, 42. Nor was there any statutory requirement that employees first be given an opportunity to improve their performance before they were removed or demoted for unacceptable performance. See *Angrisani* v. *United States*, 172 Ct. Cl. 439, 442-443 (1965). In amending Chapter 43, however, Congress mandated that agencies incorporate these requirements into their new performance appraisal systems. Thus, in

Section 4302(b)(1), Congress required that agencies establish performance standards which were tailored to the duties of each employee's position and which would "to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria * * *" (Pet. App. D at 2). The legislative history of this provision indicates that Congress intended to protect employees from the arbitrary labeling of their performance as unacceptable based on unreasonable or overly subjective performance standards. *Wells*, 1 M.S.P.B. at 222-23 (discussion of legislative history of objectivity requirement in Section 4302(b)(1)). Further, by requiring the use of objective criteria in performance standards and an opportunity to improve Congress also intended to benefit agencies by removing that element of subjectivity which had characterized the pre-1978 rating procedures and made agency performance actions difficult to defend. *Ibid.*; see also S. Rep. 95-969, *supra*, at 9-10. In Section 4302(b)(5) and (6), Congress also required, for the first time, that agencies assist employees in improving unacceptable performance and that employees be given an opportunity to demonstrate acceptable performance before agencies took action to reassign, demote, or remove them (Pet. App. D at 3). See also 5 C.F.R. 432.203(b) (1983).

The conclusion that an employee's rights to reasonable performance standards and to an opportunity to improve have a unique status in the statutory scheme is apparent not only from the legislative history, but also from the structure of the statute itself. These rights are not included in Chapter 75—yet another indication that Congress did not intend Chapter 75 to be available for performance-based actions once Chapter 43 was fully implemented. Rather, these rights are mandated in Section 4302 as integral requirements of agency performance appraisal systems and are separate and distinct from the procedural requirements found in Section 4303(b)-(d) (Pet. App. D at 3-4). Hence, it is clear

that Congress did not view these rights as mere "procedural prerequisites" (Pet. App. A at 40),[6] and the court disregarded the statute and legislative history in so finding.

The more fundamental error in the majority opinion was not so much its finding that these rights are procedural, but its conclusion that these substantive rights are totally dependent upon the label which the agency chooses to affix to the action, and hence, ultimately illusory. The court's opinion in *Wilson*, issued two months after *Lovshin*, illustrates how the *Lovshin* majority decision deprives employees of the right to reasonably objective performance standards for which Congress provided in Chapter 43. In *Wilson*, the court found that the agency's Chapter 43 action could not be sustained because it was based on a performance standard which the court found was "vague and inexact," "almost a parody of a proper standard," and "exactly the type of standard that left Wilson open to arbitrary appraisal in contravention of the Reform Act" (770 F.2d at 1053). Since the Chapter 43 action in *Wilson* had been effected before the *Lovshin* decision was issued, the agency had not relied on Chapter 75 or on both Chapters 43 and 75 as suggested by the *Lovshin* analysis. On this basis, the court in *Wilson* denied the agency's request to remand its defective Chapter 43 action to the Board for an immediate reconsideration under Chapter 75. *Id.* at 1055. Relying

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[6] Based on the statute and legislative history, the Board has held that the right to reasonable performance standards and to an opportunity to improve provided in Section 4302(b) are substantive rights which are not subject to the harmful procedural error standard in Section 7701(c)(2)(A) (Pet. App. G at 2). *Sandland* v. *General Services Administration*, 23 M.S.P.R. 583, 590 (1984) (agency has burden of showing that employee was afforded a reasonable opportunity to improve); *Callaway* v. *Dep't of Army*, 23 M.S.P.R. 592, 597 (1984) (when employee challenges performance standards, Board will review then under an abuse of discretion standard). In *Lovshin*, the court did not mention or consider the Board's decisions in *Sandland* and *Callaway*.

on *Lovshin*, however, the court did not foreclose the agency's request to proceed with a new action against Wilson under Chapter 75 "based on the same or similar set of operative facts * * *" (*ibid.*).[7] Hence, under the *Lovshin* majority's mistaken analysis of the statutory scheme, it seems that Congress intended to prohibit only Chapter 43 actions based on vague, inexact, and arbitrary performance standards, but intended to authorize Chapter 75 actions based on the same arbitrary and defective performance standards. We submit that Congress could not have intended such an anomalous and inherently inequitable result which violates both Chapters 43 and 75.[8]

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[7] The opinion in *Wilson* was written by a three-judge panel, two of whom were among the five judges who dissented from the majority opinion in *Lovshin*. This fact may explain why the court stopped short of expressly encouraging the agency to proceed with a Chapter 75 action and instead stated that "[b]ecause of the *Lovshin* decision" this question was left open. *Wilson*, 770 F.2d at 1055.

[8] Based on its erroneous finding (see note 3, *supra*), that the *Gende* decision was based on an analysis of the merit principles in 5 U.S.C. 2301, the court attempted to create a new remedy to prevent agencies from using Chapter 75 to circumvent Chapter 43 (Pet. App. A at 32-36). It is apparent, however, that the court's Chapter 23 remedy is so broad that it contravenes the express language of the statute, and at the same time was so narrowly applied by the court that it provides no protection to employees subjected to improper Chapter 75 performance actions. The court's finding that it is a prohibited personnel practice under 5 U.S.C. 2302(b)(11) to violate the merit principles found in Section 2301 (Pet. App. A at 33) contravenes the express language of the statute and its legislative history. H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 131 (1978); 2 *Leg. Hist.* 1973. The court failed to undertake the two-step analysis required to establish a prohibited personnel practice under Section 2302(b)(11). See *Wells*, 1 M.S.P.B. at 204. Even assuming the merit principles are self-executing, as the court erroneously found, the court refused to afford the petitioner the benefits of the merit principle found in Section 2301(b)(6) (Pet. App. F at 2), which arguably provides a right to an improvement period in performance-based removal actions.

In endorsing the use of two fundamentally different procedures, Chapters 43 and 75, for the same performance-based action the majority opinion has created a procedural labyrinth which will inordinately complicate the adjudication of appeals. The burden of proof, procedures, and applicable employee defenses are significantly different in Chapters 43 and 75. When agencies rely on both chapters in effecting the same action, the Board will be required to adjudicate the action under the second chapter selected by the agency if the action cannot be sustained under the first chapter. This will result in time consuming and expensive delays, contrary to congressional intent that the Board expedite appeals. 5 U.S.C. 7701(i); S. Rep. 95-969, *supra*, at 61-62. It is therefore ironic that the majority opinion objected to the simple requirement in the *Gende* decision that the agency show whether its action was based on misconduct or unacceptable performance (Pet. App. A at 32-33). Contrary to the court's findings, only in rare instances will agencies have difficulty in determining whether the charges they themselves have drafted are based on performance, misconduct, or both.

IV. THE COURT'S CRITICISMS OF THE PROCEDURES WHICH CONGRESS ESTABLISHED IN CHAPTER 43 WERE UNFOUNDED; AND EVEN ASSUMING THAT THESE CRITICISMS HAVE ANY VALIDITY, THE COURT IS WITHOUT POWER TO CHANGE THE STATUTE

A major factor the court relied on to support its holding that Chapter 43 was not the exclusive procedure for performance-based actions was its finding that if Chapter 43 was the only procedure available for such actions, "there would be serious omissions and anomalies" (Pet. App. A at 5). In essence, the majority concluded that agencies might experience difficulties in drafting performance standards for their employees, and that unless another mechanism—Chapter 75—was available, agencies

would be powerless to remove incompetent employees from their rolls (*id.* at 35). Judging from the majority's unsupported observations, one could conclude that the new Chapter 43 procedures Congress created have become an albatross for agencies rather than the streamlined, effective mechanism Congress intended.

The court's analysis is seriously flawed for several reasons. First, the statute does not require that federal agencies draft exact or totally objective performance standards; it requires only standards that are based on objective criteria "to the maximum extent feasible." See 5 U.S.C. 4302(b)(1) (Pet. App. D at 2). See *Shuman* v. *Dep't of the Treasury*, 23 M.S.P.R. 620, 626 (1984) (performance standards for professional positions where work is not susceptible to mechanical evaluation may allow for subjective criteria). Second, contrary to the court's implicit finding, performance standards are not immutable principles chiseled in granite which agencies are forbidden to revise. If an agency concludes that the performance standards it has identified for an employee's position are erroneous or incomplete, it may change the standards and still take an action under Section 4303 after communicating the change to the employee and providing an opportunity to improve. See 5 C.F.R. 432.203 (a) and (b) (1983). Third, the court's fear that agencies lack the ability to comply with the statutory requirements in Section 4302 for drafting performance standards is unfounded, and there is simply no evidence that exclusive use of Chapter 43 for performance actions will result in a flood of reversals and the retention of incompetent employees on agency rolls. Data on Chapter 43 actions indicate that agencies are having little difficulty in proving the adequacy of their performance standards before the Board.[9] Fourth, and most importantly, even

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[9] In fiscal year 1983, the only year for which detailed data is currently available, the Board's presiding officials reversed only 2% of Chapter 43 actions based on a finding that the agency's performance standards did not meet statutory requirements. Al-

assuming *arguendo* that the majority's criticisms of Chapter 43 procedures have any degree of validity, the court has no authority to sit as a committee of review, as it has done in the instant case, and to reorder the priorities Congress consciously selected as reflected in the clear language of the statute. *Tennessee Valley Authority*, 437 U.S. at 194-195.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

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I authorize the filing of this brief.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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though the majority opinion in *Lovshin* alluded to the court's own experience in reviewing Chapter 43 appeals, the majority offered no data to substantiate its observations that agencies are unable to draft adequate performance standards. We are aware of only one published decision (*Wilson* v. *Dep't of Health & Human Services*, *supra*), in which the Court of Appeals for the Federal Circuit has found that the agency's performance standards were defective.

APPENDIX

MERIT SYSTEMS PROTECTION BOARD

CH07528410223

JOHN A. GENDE, APPELLANT

v.

DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, AGENCY

Oct. 22, 1984

OPINION AND ORDER

This case presents the issue of whether agencies have the option of bringing performance-based actions under either 5 U.S.C. § 7513 or § 4303, or whether § 4303 is the exclusive procedure for such actions. In Part I, we discuss the agency's charges and the appellant's defense or rebuttal to those charges. In Part II, we review the legislative history of the Civil Service Reform Act of 1978[1] (the Reform Act), and we conclude that Congress intended agencies to utilize Chapter 43 as the exclusive procedure for performance-based actions which were effected after October 1, 1981. In Part III, we dis-

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[1] Pub.L. 94-954, 92 Stat. 1111.

cuss the standards which the Board will apply to determine if an action is based solely on performance and therefore must be taken pursuant to 5 U.S.C. § 4303. Finally, in Part IV, we find that it is appropriate to give this decision a partially prospective effect.[2]

Part I

The appellant was demoted under 5 U.S.C. § 7513 from his position of Electrician Foreman, WS-8, to the position of Correctional Officer, GS-7, at the Oxford, Wisconsin Federal Correctional Institution. The action was based on charges of careless workmanship and failure to follow agency policy and the National Electric Code which allegedly resulted in a $4,000 loss to the agency. The demotion action was effective on January 11, 1984.

On appeal to the Board's Chicago Regional Office the appellant contended that: (1) the agency was required to effect the action under 5 U.S.C. § 4303 and had failed to follow certain Chapter 43 procedures such as affording the appellant an opportunity to improve before taking action; (2) other foremen on the job site were accountable for those inmates assigned to the electrical detail and hence were accountable for the improper electrical practices cited in the charges; (3) the action was the result of harassment by two other foremen who had found the electrical practice violations and whom appellant had "written up" shortly before those foremen reported the appel-

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[2] This decision will be fully effective on the thirty-first day after the date of this decision. For the application of this decision to performance-based Chapter 75 actions effected before the effective date of this decision, see the discussion in Part IV, *infra*.

lant's alleged violations; and (4) the penalty was too harsh because appellant had no knowledge of the National Electrical Code before the action was taken and should not be penalized for his failure to follow this code.

Following a hearing, the presiding official sustained the charges, finding that the appellant was responsible for the electrical work at issue, and that the appellant's alleged lack of notice of the National Electrical Code and agency electrical policy was a damning admission which was no defense to the action or the penalty. Initial Decision (I.D.) at 2-4. In considering the appellant's contention that the agency was required to effect the action under § 4303, the presiding official noted that the agency defended the Chapter 75 action by asserting that it was based on misconduct relating to appellant's duties[3] rather than unacceptable performance under an approved performance appraisal system. The agency therefore contended that Chapter 43 was inapplicable. The presiding official found that the Board's decision in *Wells v. Harris*, 1 MSPB 199, 202, —— M.S.P.R. ——, —— (1979), stood for the proposition that an agency may bring a performance-based action under either § 7513 or § 4303, and concluded that there was no error in the agency's election to proceed under § 7513. I.D. at 3.

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[3] The gravamen of the agency's charges was directly related to one of appellant's performance standards which described the minimally satisfactory level for the element relating to "Ability To Execute the Specialty Craft." Agency File, tab 24.

> No more than three instances of violations of journeyman level trade standards or negligence with such violations resulting in replacement of materials or equipment which costs in excess of 5% of total project funds.

The presiding official also concluded that: (1) the appellant's claim of harassment was without merit; (2) the penalty was reasonable; and (3) the action promoted the efficiency of the service. The presiding official therefore sustained the action.

The appellant has filed a timely petition for review of the initial decision, reiterating his contention that the agency was required to take this action under § 4303. Pursuant to 5 U.S.C. § 7701(e)(1), the appellant's petition is GRANTED.

Part II

As a preliminary matter, we first consider whether the Board's decision in *Wells*, *supra*, disposes of the issue of whether agencies have the option of electing either Chapter 75 or Chapter 43 for performance-based actions effected after October 1, 1981. In *Wells*, the Board examined the propriety of Office of Personnel Management (OPM) interim regulations for Chapter 43 which authorized agencies to take actions against employees for failure to meet performance standards which had not been established as part of a performance appraisal system that met the statutory requirements of Chapter 43, including review and approval by OPM. *See* 5 U.S.C. §§ 4302, 4304(b)(1). The Board concluded that Congress did not intend that employees be subjected to § 4303 actions in the absence of an OPM approved agency appraisal system that met the requirements of § 4302, and the Board ruled that the OPM interim regulations that authorized such actions were therefore invalid. *Wells*, *supra*, at 234, —— M.S.P.R. at ——. The Board further stated, however, that agencies need not wait until October 1, 1981, the date agencies were required to implement OPM approved performance ap-

praisal systems, to take performance-based actions because Chapter 75 was available for such actions. *Wells* at 202, 235-36, —— M.S.P.R. at ——, —— ——.

Although *Wells* contained language that has been broadly interpreted as allowing the invocation of Chapter 75 for any performance-based actions at any time, *see Wells* at 236, —— M.S.P.R. at —— n.90, that decision specifically addressed only regulations which established interim procedures in effect before October 1, 1981. Hence, the decision in *Wells* neither directly addressed nor resolved the question of whether Chapter 75 was available for performance-based actions effected after October 1, 1981. *Wells* also failed to dispose of the related question of whether an agency, once having developed an appraisal system and obtained OPM approval of it, was precluded from invoking Chapter 75 procedures for performance-based actions in lieu of Chapter 43 procedures. Notwithstanding these facts, both the Board and the courts have interpreted *Wells* as holding that agencies generally have an option to elect to pursue performance-based actions under either 5 U.S.C. § 4303 or § 7513. *See e.g., Hatcher v. Department of the Air Force*, 10 MSPB 159, —— M.S.P.R. —— (1982), *aff'd* 705 F.2d 1309 (11th Cir. 1983).[4] These court decisions concerned actions taken before October 1, 1981, and it is clear that the actions were taken under Chapter 75, or converted to

[4] *See also DeBose v. Department of Agriculture*, 700 F.2d 1262 (9th Cir. 1983); *Drew v. Department of the Navy*, 672 F.2d 197, 200 (D.C.Cir. 1982); *Kochanny v. Bureau of Alcohol, Tobacco & Firearms*, 694 F.2d 698, 701 (Fed.Cir. 1982); *Darby v. Internal Revenue Service*, 672 F.2d 192, 195 (D.C. Cir. 1982).

Chapter 75 pursuant to *Wells*, because the agencies involved did not have performance appraisal systems in place. In the absence of such systems, the agencies would not have been able to take any performance-based actions if Chapter 75 procedures were not available for that interim period. OPM's regulations in Part 430 (performance appraisal) and Part 432 (reduction in grade and removal based on unacceptable performance) are consistent with this view. These regulations required agencies to implement an OPM approved performance appraisal system no later than October 1, 1981 but also permitted agencies to take performance-based actions under Chapter 75 prior to the completion of such systems. 5 C.F.R. §§ 430.201, 432.205(b) (1983). These courts did not address, nor was there a need to address, the exclusive application of Chapter 43 procedures for performance-based actions effected after the interim period. Consequently, we find that neither *Wells* nor the court decisions adopting *Wells* dispose of the issue raised in this appeal. In the wake of *Wells*, the question of whether and when an agency may convert a defective Chapter 43 action to a Chapter 75 action, however, has admittedly generated a number of inconsistent Board decisions.[5] Based on our analysis of the legislative history of the Reform Act, however, we find that reading *Wells* as

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[5] *See Price v. Department of Treasury*, 3 MSPB 314, —— M.S.P.R. —— (1980), 7 MSPB 6 (1981) (Board reverses defective Chapter 43 action and rejects agency motion to remand action, under *Wells*, for reconsideration as Chapter 75 action); *Young v. Department of the Navy*, 7 MSPB 7, —— M.S.P.R. —— (1981) (Board considers defective Chapter 75 action on its own motion). *See also Drew, supra*, at 205 n. 6 (dissenting opinion).

holding that agencies may effect performance-based Chapter 75 actions after October 1, 1981 is impossible to reconcile with specific provisions of the Reform Act, and that to the extent that *Wells* allows for such an interpretation, it must therefore be modified.

A review of the legislative history of the Reform Act indicates that Congress did not expressly state whether, in enacting Chapter 43, it was thereby prohibiting the use of Chapter 75 to effect performance-based actions. There are persuasive indications in the legislative history, however, that Congress intended performance-based removal and demotion actions to be effected exclusively under Chapter 43 procedures. One of the primary aims of the Reform Act was to simplify and expedite procedures to take action against employees whose performance was unacceptable. *See* S.Rep. No. 95-969, 95th Cong., 2d Sess. 2 (1978) (hereinafter referred to as *Senate Report*), *reprinted in* House Comm. on Post Office and Civil Service, 96th Cong. 1st Sess., *Legislative History of the Civil Service Reform Act of 1978*, at 1466 (Comm. Print No. 96-2, 1979) (hereinafter referred to as *Legislative History*), U.S. Code Cong. & Admin. News 1978, 2723. In explaining the need for new procedures to govern performance-based actions, Congress found that Chapter 75 procedures were ineffective and made it difficult to remove poor performers. Among the defects in the existing Chapter 75 procedures that Congress identified were "performance evaluation procedures [that] do not work well enough to distinguish employees whose performance is below an acceptable level to make the charges stick," as well as "inordinate procedural requirements and unreasonable standards." *Senate Report*

at 9, 40, U.S. Code Cong. & Admin. News 1978, at 2731, 2762.

To remedy these defects, Congress amended Chapter 43 to require agencies to establish new performance appraisal systems in § 4302 that would provide the basis for effecting a variety of personnel actions, including the removal and demotion actions specified in § 4303. The legislative history clearly demonstrates that Congress intended that agency decisions to remove or retain employees be based on the results of § 4302 performance appraisal systems:

> The purpose of section 203 is to provide for new systems of appraising employee work performance. The principal changes it makes in Chapter 43 of title 5, United States Code are the following:
>
> —Abolishment of present requirements of summary adjective ratings and appeals for performance ratings;
>
> —Establishment of revised performance appraisal system to be *used as a basis for developing, rewarding, reassigning, demoting, promoting, retaining, and removing employees;* and
>
> —Establishment of *new procedures* for taking action based on unacceptable performance.[6] (Emphasis supplied.)

The Congressional intent to interweave these new appraisal systems with performance-based actions is also reflected in the statutory language itself. Sec-

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[6] *Senate Report* at 39, U.S.Code Cong. & Admin.News 1978, at 2761.

tion 4302(b) requires that each performance appraisal system provide for:

> (2) . . . not later than October 1, 1981 . . . communicating to each employee the performance standards and critical elements of the employee's position;
>
> (3) evaluating each employee during the appraisal period on such standards;
>
> (4) recognizing and rewarding employees whose performance so warrants;
>
> (5) assisting employees in improving unacceptable performance; and
>
> (6) *reassigning, reducing in grade,* or *removing employees* who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance. (Emphasis supplied.)

Additionally, it is clear that another purpose Congress wished to achieve in enacting this integrated framework for performance-based actions was to protect employees from actions based on *ad hoc* performance standards that agencies had never communicated to employees or actions based on standards that had been developed at the unreviewed discretion of agencies.[7] Thus, to the extent that Chapter 75 actions are based on unreviewed or *ad hoc* perform-

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[7] *See* House Comm. on Post Office and Civil Service, *Civil Service Reform Act of 1978,* H.Rep. No. 95-1403, 95th Cong., 2d Sess. 21 (1978) ("no employee will be disciplined when performance standards and critical elements have not been adequately defined by an agency.") *See also Wells, supra,* 1 MSPB at 221-23, —— M.S.P.R. at ——-——.

ance standards such actions are clearly inconsistent with Congressional intent as shown in the Reform Act.

To expedite actions based on unacceptable performance, Congress also concluded that agencies should have the benefit of a less burdensome standard of proof than for actions based on misconduct.[8] In discussing this new standard Congress consistently distinguished Chapter 43 from Chapter 75 actions by referring to Chapter 75 actions as misconduct-based adverse actions, and these references are another persuasive indication that Congress intended Chapter 43 procedures to serve as the exclusive vehicle for performance-based actions. For example, in explaining the reasons for the adoption of a lower evidentiary standard, the Senate Report stated that:

> Moreover, there are some important differences mandated by the special nature of actions taken for unacceptable performance. An agency's assessment of an employee's overall performance in light of its needs and standards may be the most important part of the case. Yet it may be less susceptible to proof through traditional trial-type procedure than when the agency *takes an adverse action on the basis of employee miscon-*

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[8] 5 U.S.C. § 7701(c)(1) provides that "in the case of an action based on unacceptable performance described in section 4303 of this title" the agency action shall be sustained only if "supported by substantial evidence" and shall be sustained "in any other case" if supported by a "preponderance of the evidence." *See also* 5 C.F.R. § 1201.56(c). The substantial evidence standard is interpreted as authorizing a less intrusive review of the agency decision than the preponderance of evidence standard. *Parker v. Defense Logistics Agency*, 1 MSPB 489, 504, —— M.S.P.R. ——, —— (1980).

> *duct* which is linked to specific provable offenses. *Senate Report* at 44, U.S. Code Cong. & Admin. News 1978, at 2766. (Emphasis supplied.)

Additionally, we find it significant that the Conference Report that accompanied the bill in its final form before its enactment used the terms "actions based on unacceptable performance" and "performance cases" interchangeably in identifying the kind of actions which would be upheld if supported by substantial evidence.[9] *Legislative History* at 1980-81. Thus, this language clearly supports the view that Congress intended the Board to apply the substantial evidence standard to all performance-based actions. Since Congress provided in § 7701 that this standard was only applicable to § 4303 actions, the conclusion that Congress intended Chapter 43 to serve as the exclusive vehicle for performance-based removal and demotion actions is inescapable.[10]

Finally, we note that in discussing the procedures for Chapter 75 actions, Congress clearly drew a distinction between § 7513 actions and performance-

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[9] Although we have previously recognized that "unacceptable performance" as defined in § 4301(3) is a term of art, rather than a general term covering all types of poor performance, *see Wells, supra*, 1 MSPB at 235, —— M.S.P.R. at ——, this distinction does not dispose of the issue of whether Congress intended that all performance-based actions be brought under Chapter 43.

[10] Based on an analysis of the legislative history of the Reform Act, the Board has previously held that Congress intended the Board to apply the substantial evidence standard to agency actions under 5 U.S.C. § 5335 denying an employee's periodic within-grade salary step increase because of the clear connection between § 5335 and the requirements of Chapter 43. *Parker, supra*, 1 MSPB at 504, —— M.S.P.R. at ——.

based actions under § 4303: "Section 204(a) of the bill also substantially amends subchapter II of Chapter 75 . . . . *These provisions govern any such action where the basis of the agency action is misconduct or any other cause besides unacceptable performance. Actions based on unacceptable performance are governed by Chapter 43. . . .*" [11] *Senate Report* at 46, U.S. Code Cong. & Admin.News 1978, at 2768. (Emphasis supplied.)

As a general principle of statutory construction, the fact that a statute grants authority to carry out an action and prescribes procedures for how the action will be carried out serves as a persuasive indication that these procedures are mandatory, despite the fact that taking the action in the first place was discretionary. This maximum is known as *expressio unius est exclusio alterius* and its literal meaning is that the expression of one thing excludes another. *See generally* 2A C. Sands, *Sutherland Statutory Construction*, §§ 47.23-25 (4th ed. 1973); [12] 73 Am.Jur.2d Statutes § 212 (1974). In articulating this principle, the Supreme Court stated that "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379 (1929); *cf. American Sec. & Trust Co. v. Commissioners of D.C.*, 224 U.S. 491, 495, 32 S.Ct. 553, 554, 56 L.Ed. 856 (1912). Here, there are specific references in the statute and legis-

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[11] *See also* 5 U.S.C. § 7512, which excludes "a reduction in grade or removal under section 4303 of this title" from actions covered by Subchapter II of Chapter 75.

[12] The maxim of *expressio unius* is generally regarded as an aid to construction, rather than a rule. *See Sands, supra*, at § 47.23.

lative history that indicate that Congress intended Chapter 43 procedures to govern performance based actions and there are no indications that Chapter 75 procedures are permissible for such actions. The application of the maximum of *expressio unius* thus suggests that the utilization of Chapter 43 is mandatory for performance-based actions, and this principle is even more persuasive when, as here, the application of the procedures is statutorily required. 5 U.S.C. §§ 4302(a)(3) and (b)(6).

Based on the foregoing analysis, we conclude that Congress clearly intended to bifurcate performance-based actions from misconduct-based actions and to create new streamlined procedures for performance-based actions which were linked to § 4302 appraisal systems that Congress required be fully operational by October 1, 1981. Nearly three years have passed since this deadline date, and OPM has publicly stated that it has reviewed and approved the performance appraisal systems currently in use by all Federal departments and agencies.[13] Any conclusion that Congress intended to create, *sub silentio*, a hybrid category of performance-based actions in lieu of, or in addition to, § 4303 actions is simply untenable at this point in time. *See Drew*, *supra*, at 206 (Mikva, J., dissenting) ("It is not for this court or the Board to fashion a hybrid procedure and pronounce that it is just as good as anything Congress can do.") Such an interpretation would render Chapter 43 meaningless since agencies taking performance-based Chapter 75 actions could freely disregard the procedures which Congress provided for § 4303 actions and could likewise ignore the clear statutory requirements in § 4302

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[13] The Year in Review, United States Office of Personnel Management (1981) at 9-10.

mandating that the results of agency performance appraisal systems be utilized as the basis for making decisions to retain or remove employees. It is also clear that Congress expended considerable effort in creating the new Chapter 43 procedures [14] and the legislative history supports the view that this chapter was the centerpiece of the Reform Act. There is no indication in the legislative history that Congress intended Chapter 43 procedures to be invoked at the option of agencies if and when the agencies believed such procedures were more desirable than Chapter 75 procedures. The legislative history makes it clear that Congress envisioned that Chapter 43 would provide significant advantages to Federal agencies and employees as well as the public as a whole, which were not then and are not now present in Chapter 75. We believe that to allow agencies unfettered discretion in choosing to ignore such benefits could only have the effect of frustrating Congressional intent.

In sum, the Board holds that Congress intended agencies to utilize Chapter 43 as the exclusive procedure for performance-based actions effected after October 1, 1981. We further hold that, in light of this Congressional intent, § 7513 provides no authority for agencies to effect such actions after October 1, 1981. There are two situations where this rule is clearly inapplicable. Actions based on both performance and nonperformance factors fall within the cov-

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[14] Congress described the change in the standard of proof in Chapter 43 actions as the "most important part" of the proposed Chapter 43 provisions. *Senate Report* at 44. One of the sponsors of the Senate bill stated that the change in the evidentiary standard was a "single reform [which] alone is worth the tremendous effort that has been put into this legislation." *Legislative History* at 1727 (Statement of Senator Percy on Senate floor).

erage of Chapter 75, pursuant to 5 C.F.R. § 752.401 (a)(2) (1983).[15] Additionally, the rule is also not applicable to agencies and employees who do not fall within the coverage of Chapter 43 at all, as provided by statute or regulation. *See* 5 U.S.C. § 4301(1)(2); 5 C.F.R. § 430.201(c) (1983).

Finally, we find it appropriate to identify two possible exceptions to the rule, reserving judgment on any future exceptions as the law in this area evolves. Consistent with OPM guidance, agencies *may* bring Chapter 75 actions based on insubordination when the charges are based solely on an employee's intentional refusal to perform. *See* Federal Personnel Manual (FPM) Letter 432-1 at 2 (May 5, 1983). In such cases, we find that the procedures applicable to Chapter 43, such as the communication of elements and standards and the provision of an opportunity to demonstrate acceptable performance would serve no purpose and Congressional intent regarding Chapter 43 would not be furthered by mandating such procedures for these actions which are only indirectly related to performance. In such cases, however, the agency must prove, by preponderant evidence, that the charges are based on the employee's intentional refusal to perform as opposed to a mere failure to perform in order to invoke this exception. Alternatively, agencies faced with an employee's refusal to perform *may* bring such actions under Chapter 43

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[15] In recognizing this exception, we reverse judgment on the disposition of cases where the Board does not sustain the misconduct or nonperformance related charges. We also reserve judgment on cases where an appellant alleges that the agency acted in bad faith in adding a charge based on other than performance factors in order to bring that action within the coverage of Chapter 75.

procedures if the action is based solely on the employee's failure to "meet established performance standards in one or more critical elements" as specified in § 4301(3), after first providing the employee with an opportunity to demonstrate acceptable performance. *See Sandland v. General Services Administration*, 23 M.S.P.R. 583 (1984).

A second exception to this rule may be appropriate when the agency's charges are performance-based, but the agency is able to establish, by preponderant evidence, that there is a substantial likelihood that providing the employee with an opportunity to demonstrate acceptable performance before proposing the action will result in injury, death, breach of security, or great monetary loss.[16]

Part III Standards That The Board Will Apply In Determining If Actions Are Based Solely on Performance

At the outset, we find it appropriate to frame the rule we have articulated in this decision in terms of a rebuttable presumption. Thus, the Board will presume that a performance-based Chapter 75 action effected after October 1, 1981, is void *ab initio* unless the agency shows, by preponderant evidence, that: (1) the action is based solely on misconduct rather than performance or, as noted above, on both; or (2)

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[16] These factors are identical to those which the Board has discussed in reference to absolute performance standards in *Callaway v. Department of the Army*, 23 M.S.P.R. 592, 598 (1984). In that decision, the Board found that an absolute performance standard (a standard that leaves no room for errors) might be appropriate where a single failure to meet the standards could result in injury, death, breaches of security, or great monetary loss.

the action is excluded or excepted from the rule, as described in Part II; or (3) that the action should otherwise be excepted from the rule based on public policy or other considerations.[17]

In determining whether Chapter 75 actions are based on performance or misconduct, the Board will utilize two standards. First, the Board will presume, subject to agency rebuttal by preponderant evidence, that charges which directly relate to an appellant's critical or non-critical elements[18] or performance standards are performance-based, irrespective of whether the agency is able to frame the charges in terms of misconduct. Since many violations of performance standards can easily be characterized as misconduct, no purpose would be served by adopting a standard that attempts to distinguish performance and misconduct actions based solely on the agency's characterization of the charges.[19]

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[17] The agency's burden of establishing that it has invoked Chapter 75 for a *bona fide* reason is analogous to an agency establishing, in RIF actions, that it invoked RIF procedures for a *bona fide* reason. *Losure v. Interstate Commerce Commission*, 2 MSPB 361, 366, —— M.S.P.R. ——, —— (1980).

[18] One consequence of the Board's ruling in this decision and of the application of this standard is that agencies may not take any removal or demotion actions based on an employee's non-critical elements. Such performance-based actions are not available under Chapter 75 and are not included in § 4303 since § 4303 actions must be based on a failure to meet critical elements. 5 U.S.C. § 4303(b)(1)(A)(ii). In such cases, however, if the agency were to reassign the employee, any such reassignment would not be appealable to the Board under Chapter 43. *See* 5 U.S.C. §§ 4302(a)(3), (b)(6); 4303(e).

[19] The term "misconduct" encompasses a wide range of meanings and has been variously defined to include intentional

A second standard the Board [20] will utilize to determine whether Chapter 75 actions are based on performance or misconduct may be stated as follows: The Board will also presume, subject to agency rebuttal by preponderant evidence, that charges which directly relate to the appellant's duties and responsibilities, or work-related tasks, functions, and objectives, as shown in the employee's position description or by other relevant evidence, are performance-based,[21] and may not, therefore, be taken under § 7513.

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wrong-doing as well as malfeasance, mismanagement, and dereliction of duty. 58 C.J.S. Misconduct (1948). Thus, if a clerk-typist's performance standard describes minimally acceptable performance as no more than three errors per page, the agency would be precluded, under the rule we announce today, from defining two errors per page as carelessness and bringing a Chapter 75 action based on misconduct. This result is thus consistent with Congressional intent that agencies may not subject employees to performance-based actions based on performance standards or expectations which have not been communicated to them. *See* note 7, *supra*. By the same token, employees may not escape § 4303 actions by asserting that their failure to meet performance standards for critical elements can be characterized as misconduct and hence must be brought under § 7513.

[20] As a threshold matter, the Board's presiding officials will determine if either of these two presumptions are applicable to the agency's Chapter 75 action. If so, the presiding official will provide the agency with an opporunity to present evidence or argument to rebut the presumption and will make a ruling regarding whether the agency has properly invoked Chapter 75.

[21] This definition is substantially identical to the definition which OPM has developed for performance elements. FPM Chapter 430, Subchap. 2-1 (c) (1980).

Part IV Rationale For a Partially Prospective Application Of This Decision

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-6, 30 L.Ed.2d 296 (1971), the Supreme Court set forth three factors to apply in determining whether a rule of law should be applied only prospectively. First, "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." Second, the merits and demerits in each case must be reviewed by examining "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." The third factor discussed by the Court was a requirement to weigh any "inequity imposed by retroactive application."

With regard to the first factor, it is clear that the Board's ruling in this decision that Chapter 43 procedures are the exclusive means of effecting performance-based actions after October 1981, is a new rule of law requiring the Board to overrule or modify that portion of *Wells* and its progeny that has been interpreted as holding that performance-based Chapter 75 actions were available after the October 1981 deadline date. As discussed in Part II of this decision, neither *Wells* nor the court decisions affirming *Wells* foreclosed the question of whether Congress intended Chapter 43 to serve as the exclusive procedure for performance-based actions taken after the date that agencies were required to have implemented OPM approved performance appraisal systems.

In terms of the second and third factors, we conclude that a totally retroactive application of this

decision would impose a substantial inequity on agencies which have relied on *Wells* to take performance-based Chapter 75 actions, and would not serve to advance the application of the new rule announced here while compounding the inconsistency that was generated in the wake of Board decisions following *Wells* regarding what procedures were applicable in cases remanded under *Wells*.[22] The purpose of the rule announced here is to assure that performance-based actions are effected in accordance with the intent of Congress. To reverse all performance-based actions effected under Chapter 75 before the effective date of this decision but after October 1, 1981, would, we find, frustrate this intent and advance no other important purpose. *See Linkletter v. Walker*, 381 U.S. 618, 636-7, 85 S.Ct. 1731, 1741-2, 14 L.Ed.2d 601 (1965). It is also clear, however, that a completely prospective application of this decision would frustrate Congressional intent to require agencies to utilize Chapter 43 procedures for performance-based actions taken after October 1, 1981, and would impose substantial inequities on appellants who may not have been afforded the substantive and procedural safeguards applicable to Chapter 43 actions.[23]

In light of the above, we conclude that a partially prospective application of this decision is the most

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[22] *See* note 5, *supra*.

[23] Before proposing a § 4303 action, agencies must provide the employee with an opportunity to demonstrate acceptable performance. *See* 5 U.S.C. § 4302(b)(6); 5 C.F.R. § 432.203(b) (1983). *See also Sandland, supra*. There is also a one-year limitation on the instances of unacceptable performance on which the action may be based and a requirement for the concurrence of a higher-level official in the decision. 5 U.S.C. § 4303(b), (c).

appropriate action that will balance the interests of both agencies and appellants and further the application of this rule in as equitable a manner as possible. This decision will be fully effective on the thirty-first day after the date of this decision. This 30-day period will provide agencies which have initiated or effected performance-based Chapter 75 actions with an opportunity to reconsider these actions in light of this decision. The Board will apply this decision in its entirety to agency actions that are effected[24] after this 30-day period, and such actions which have been improperly effected under Chapter 75 will be reversed. However, in cases where the agency effected the action before the end of this 30-day period, such as the instant action, the Board will provide the agency with an opportunity to elect to have the action reconsidered under Chapter 43 standards and adjudicated as a Chapter 43 action after submission of further argument by the parties. If the agency elects to proceed in that manner, with the one exception noted herein, its action will be adjudicated solely on the basis of the present record with no further opportunity to submit proof of the merits of the charge. Similarly, the appellant may not argue the merits of any affirmative defense which was or could have been raised in the context of the Chapter 75 action. The single exception to the rule that the record may not be supplemented is that the parties may introduce testimonial or documentary evidence regarding compliance with Chapter 43 procedures, and the appellant may raise any defense or rebuttal applicable to Chapter 43 actions. In the alternative, the

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[24] As a general rule, the effective date of an action will be the effective date shown on the personnel action (SF-50) form.

agency may show that its action falls within one of the exceptions to the rule discussed herein and is thus a proper performance-based Chapter 75 action.

Accordingly, the initial decision of the presiding official in this appeal is VACATED and the appeal is REMANDED to the Chicago Regional Office for further adjudication consistent with this opinion.

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